

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 03-144
FM Broadcast Stations.)	RM-10733
(Gunnison, Crawford, and Olathe, Breckenridge,)	RM-10788
Eagle, Fort Morgan, Greenwood Village,)	RM-10789
Loveland, and Strasburg, Colorado, and Laramie,)	
Wyoming) ¹)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: September 15, 2004

Released: September 20, 2004

By the Chief, Audio Division:

1. The Audio Division has before it the *Notice of Proposed Rule Making*² issued at the request of Dana J. Puopolo ("Petitioner"). Petitioner filed comments. Mayflower-Crawford Broadcasters ("MCB") filed a counterproposal.³ Petitioner filed reply comments in response to the counterproposal, which MCB filed responsive comments. Lenora Alexander, former licensee of FM Station KAGM; KAGM Joint Venture, proposed licensee of Station KAGM;⁴ and On-Air Family, LLC, licensee of Station KBRU-FM, Channel 268C, Fort Morgan, Colorado (collectively "Joint Petitioners") filed a separate Petition for Rule Making ("Petition"), which conflicts with the MCB counterproposal. KAGM, LLC filed reply comments to the *Public Notice*. No other comments or counterproposals were received in this proceeding.

2. **Background.** The *Notice* proposed the allotment of Channel 299C3 at Gunnison, Colorado, as that community's fourth local service. In response to the *Notice*, Petitioner filed comments, reiterating an intention to apply for Channel 299C3 at Gunnison, if allotted. MCB timely filed a counterproposal requesting the allotment of Channel 272C2 to Crawford, Colorado, as its first local service. To accommodate the allotment at Crawford, MCB also requests the substitution of Channel 299A for Channel 272A at Station KVLE-FM, Gunnison, Colorado.⁵ This proposed substitution conflicts with the proposed

¹ Crawford, Olathe, Breckenridge, Eagle, Fort Morgan, Greenwood Village, Loveland, and Strasburg, Colorado, and Laramie, Wyoming have been added to the caption. See *Public Notice*, Report No. 2629 released September 16, 2003.

² See *Gunnison, Colorado*, 18 FCC Rcd 12696 (MB 2003) ("Notice").

³ After issuance of the *Public Notice*, MCB filed a Request for Approval of Withdrawal of Counterproposal ("Request"). However, MCB recently filed a Reinstatement of Interest in its counterproposal. Petitioner subsequently filed, an Opposition to MCB Reinstatement of Interest. Given the fact that we have not acted on the withdrawal request, we will continue to consider the MCB counterproposal in the context of this proceeding.

⁴ KAGM, LLC became the licensee of Station KAGM on May 19, 2003. See BALH-20030429ABI.

⁵ In response, we issued an *Order to Show Cause* to Pilgrim Communications, Inc., licensee of Station KVLE-FM, Channel 272A, Crawford, Colorado. See *Gunnison, Crawford, and Olathe, Breckenridge, Eagle, Fort Morgan, Greenwood Village, Loveland, and Strasburg, Colorado, and Laramie, WY*, 18 FCC Rcd 20070 (MB 2003). Pilgrim Communications, Inc. filed no responsive comments.

Channel 299C3 allotment at Gunnison. In addition, MCB requests a change in reference coordinates for vacant Channel 270C2 at Olathe, Colorado.⁶

3. In a related context, the Joint Petitioners filed a Petition prior to the August 22, 2003 comment date in this proceeding. The Joint Petitioners proposed the reallocation of Channel 272A from Strasburg to Greenwood Village, Colorado, as its first local service, and modification of the license of FM Station KAGM to reflect this change. The proposed Greenwood Village reallocation requires the substitution of Channel 268C for Channel 269A at Fort Morgan, Colorado, reallocation of Channel 268C from Fort Morgan to Strasburg, Colorado, and modification of the license for Station KBRU-FM to prevent removal of Strasburg's sole local existing service;⁷ and the relocation of the transmitter sites for Station KSMT-FM, Channel 272A, Breckenridge, Colorado and Station KTRR-FM, Channel 273C2, Loveland, Colorado.⁸ To facilitate Station KSMT-FM relocation, the Joint Petitioners requested to relocate the transmitter site of FM Station KTUN, Channel 269C1, Eagle Colorado, and modify its license to reflect this change.⁹ Moreover, the relocation of Station KTRR-FM requires the relocation of transmitter site for Station KARS-FM, Channel 275C1, Laramie, Wyoming, and modification of its license accordingly.¹⁰ Station KSMT-FM relocation conflicts with the proposed allotment of Channel 272C2 at Crawford. As such, we will consider this Petition as a counterproposal in this proceeding because of its mutual exclusivity.

4. **Discussion.** Joint Petitioners' proposal involves short-spacings to four authorized stations. To eliminate the Section 73.207 violations, the four stations have agreed to the "relocation" of their respective "transmitter site reference points" and pledged to file applications to implement the proposed relocations in the event the Joint Petitioners' proposal is adopted.

5. The rules do not permit the acceptance of proffers of hypothetical transmitter site relocations to change reference points for licensed stations. Section 73.207 of the Commission's rules establishes minimum distance separations between and among allotments and assignments in the non-reserved FM band.¹¹ Section 73.208(a) sets forth a hierarchy of reference points that "*must be used*"¹² in FM allotment

⁶ The proposed reference coordinates for Channel 270C2 at Olathe, CO are 38-26-25 NL and 108-09-47 WL. This site requires a site restriction 15.8 kilometers (9.8 miles) west of the community.

⁷ Station KBRU-FM was granted a construction permit to specify operation on Channel 268C in lieu of Channel 269A at Fort Morgan, Colorado. See BPH-20020813ABJ. The FM Table of Allotments reflects this change. See *Various Locations*, 18 FCC Rcd 19203 (MB 2003). Additionally, the reallocation of Channel 268C to Strasburg, Colorado requires the reclassification of Station KOLT-FM, Bridgeport, Nebraska to C0 facilities. This occurred on August 29, 2003. See BLH-20010827AAD.

⁸ In this regard, Rocky Mountain Broadcasting I, LLC, licensee of Station KSMT-FM and Regent Broadcasting of Ft. Collins, Inc., licensee of FM Station KTRR have consented to the relocation of their respective transmitter sites.

⁹ Salisbury Broadcasting Colorado, LLP, licensee of FM Station KTUN has consented to these proposed changes. The Channel 269C1 substitution at Eagle was originally proposed in the petition, however Station KTUN-FM was later granted a construction permit to specify operation on Channel 269C1 instead of Channel 268C at Eagle, Colorado. See BPH-20020813ABK. The FM Table of Allotments reflects this change. See *Various Locations*, 18 FCC Rcd 19203 (MB 2003).

¹⁰ AGM-Nevada, LLC, licensee of Station KARS-FM has consented to these changes. The Channel 275C1 at Laramie was also originally proposed in the petition, but Station KARS-FM was also later granted a construction permit to specify operation on Channel 275C1 in lieu of Channel 275C at Laramie, Wyoming. See BMPH-20020926ABK.

¹¹ 47 C.F.R. § 73.207.

¹² *Id.* § 73.208(a)(1) (emphasis added).

proceedings to determine compliance with Section 73.207 protection standards. The “first”¹³ of these, applicable here, is authorized transmitter sites. As a result, these stations cannot avail themselves of the reference point relocation provisions of Section 73.208(a)(2). That subsection is explicitly limited to calculations based on “community reference points” of proposed and vacant allotments rather than “transmitter sites” of authorized stations. We recognize that the staff has accepted these fictional reference points in prior decisions, essentially permitting licensed stations to selectively exempt themselves from the foundational requirement of full Section 73.207 spacing in FM allotment proceedings.¹⁴ This practice however, is contrary to the plain language of the rule and those cases are overruled. Accordingly, the reference point relocation proffer is without effect and the Joint Petitioners’ proposal is hereby dismissed for failure to comply with the minimum spacing requirements of Section 73.207.

6. The MCB counterproposal is mutually exclusive with the *Notice’s* proposal to allot Channel 299C3 at Gunnison. Since there are no alternative channels available, it is necessary to evaluate the *Notice’s* proposal for Channel 299C3 at Gunnison, as its fourth local service against the MCB counterproposal for Channel 272C2 at Crawford, as its first local service. This evaluation is based upon the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.¹⁵ In this instance, a first local service at Crawford (priority 3) is preferred over a fourth local service at Gunnison (priority 4).

7. Accordingly, we are allotting Channel 272C2 at Crawford, as its first local service.¹⁶ Moreover, we are substituting Channel 299A for Channel 272A at Station KVLE-FM, Gunnison, Colorado since no responsive comments relating to the show cause order was filed by Pilgrim Communications, Inc.¹⁷ MCB has agreed to reimburse Pilgrim Communications, Inc. for the reasonable costs incurred in connection with the change of Station KVLE-FM channel. In addition, we are changing the reference coordinates for vacant Channel 270C2 at Olathe, Colorado.¹⁸ Channel 272C2 can be allotted to Crawford, consistent with the minimum distance separation requirements of the Commission’s rules provided there is a site restriction of 20.9 kilometers (13.0 miles) southeast of the community.¹⁹ The

¹³ *Id.* § 73.208(a)(1)(i). See, e.g., *Sibley, Iowa, and Brandon, South Dakota*, 13 FCC Rcd 22209, 22210 (M.M.Bur. 1998) (rejecting short-spacing argument predicated on allotment reference coordinates; rulemaking petition is fully spaced to construction permit site, “the first applicable reference point” under Section 73.208.)

¹⁴ See e.g., *Auburn, Alabama et.al*, 18 FCC Rcd 10333 (MB 2003), *Old Fort, Fletcher, and Asheville, North Carolina; Surgoinsville, Tennessee, and Augusta, Georgia*, 18 FCC Rcd 12181 (MB 2003) and *Ft. Myers Villas, Indiantown, Jupiter, Key Colony Beach, Naples and Tice, Florida*, 13 FCC Rcd 15542 (MMB 1998).

¹⁵ The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)], See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1988).

¹⁶ Crawford was incorporated in 1910 and is listed as a town in the 2000 U.S. Census with a population of 366 persons. Crawford has its own airport, library, fire department, chamber of commerce, post office and zip code (81415). Crawford also has several churches and businesses.

¹⁷ Station KVLE-FM license at Gunnison, Colorado can be modified to specify operation on Channel 299A at its current authorized transmitter site (BLH-19800425AB). The coordinates for Channel 299A at Gunnison, Colorado are 38-33-53 NL and 106-55-38 WL.

¹⁸ The reference coordinates for Channel 270C2 at Olathe, CO are 38-26-25 NL and 108-09-47 WL. This site requires a site restriction 15.8 kilometers (9.8 miles) west of the community.

¹⁹ The reference coordinates for Channel 272C2 at Crawford are 38-32-05 North Latitude and 107-30-27 West Longitude.

Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

8. Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective November 5, 2004, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

<u>Communities</u>	<u>Channel No.</u>
Crawford, Colorado	272C2
Gunnison, Colorado	252C3, 299A

9. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) the authorization of Pilgrim Communications, Inc. for Station KVLE-FM, Channel 272A, Gunnison, Colorado, IS MODIFIED to specify operation on Channel 299A at Gunnison, Colorado, subject to the following conditions:

(a) Within 90 days of the effective date of the *Order*, the licensee of Station KVLE-FM shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules, unless the proposed facilities are categorically excluded from environmental processing.

10. The window period for filing applications for Channel 272C2 at Crawford, Colorado will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent order.

11. IT IS ORDERED, That the Petition for Rulemaking filed by Dana J. Puopolo IS DENIED.

12. IT IS ORDERED, That the Petition for Rulemaking jointly filed by Lenora Alexander, KAGM Joint Venture, and On-Air Family, LLC IS DISMISSED.

13. IT IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED

14. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau